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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-530

TEXAS OIL & GAS CORP., GREENBRIAR 74 LIMITED, ZOLLER & DANNENBERG, INC., JOSEPH K. CASKEY AND WESSELY ENERGY CORPORATION, *Petitioners,*

against

MICHIGAN WISCONSIN PIPE LINE COMPANY and the FEDERAL ENERGY REGULATORY COMMISSION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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TEXAS OIL & GAS CORP., GREENBRIAR 74 LIMITED, ZOLLER & DANNENBERG, INC., JOSEPH K. CASKEY AND WESSELY ENERGY CORPORATION, *Petitioners,*

v.

MICHIGAN WISCONSIN PIPE LINE COMPANY and the FEDERAL ENERGY REGULATORY COMMISSION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on July 17, 1979.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is printed in Appendix A hereto. The order of the Court of Appeals denying the Petitioners' Petition for Rehearing is printed in Appendix B hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the original cause of action was invoked under the provisions of 28 U.S.C. §§ 1331, 1332 and 15 U.S.C. § 717u.

QUESTIONS PRESENTED

This case presents important questions concerning the Federal Energy Regulatory Commission's (hereinafter "Commission") authority over natural gas under the new comprehensive federal scheme for regulating natural gas created by the Natural Gas Policy Act of 1978.

The specific questions are:

1. Did the court of appeals deny effect to the express desire of Congress by failing to consider the impact of the Natural Gas Policy Act of 1978 on the Commission's authority under Section 7(b) of the Natural Gas Act and this Court's interpretation of that authority in *California* v. *Southland Royalty Co.*, 436 U.S. 519 and *United Gas Pipe Line Co.* v. *McCombs,* 47 U.S.L.W. 4728 (Issued June 18, 1979)?

2. *Assuming arguendo* that the Natural Gas Policy Act does not apply to the facts of this case, did the court of appeals err in failing to distinguish the factual differences between the instant case and *California* v. *Southland Royalty Co., supra,* and *United Gas Pipe Line Co.* v. *McCombs, supra,* and does the court of appeals' application of the principles of *Southland* and *McCombs* to this case result in a taking of property without due process, in violation of the Fifth Amendment of the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision relied on is the Fifth Amendment of the United States Constitution which in pertinent part reads, "No person shall . . . be deprived of life, liberty or property without due process of law. . . ." U.S. Const., Amend. V.

STATUTES INVOLVED

Essentially, the statutes involved are the Natural Gas Act of 1938, codified as 15 U.S.C. § 717 *et seq.* and the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350. The pertinent sections of the Natural Gas Act are 15 U.S.C. §§ 717(b), 17f(b), and 717f(c) and of the Natural Gas Policy Act are Section 2(18) (A) and (B) and Section 601(a)(1)(A).

STATEMENT

In the early 1960's, Shell Oil Company (hereinafter "Shell") assembled a block of acreage consisting of section 26, township 22 North, range 17 West, Woodward County, Oklahoma, upon which it drilled the Number 1 Garvie Well. Production from that well commenced in 1962 and ceased in January, 1969. Upon receipt of the appropriate certificates of public convenience and necessity from the Federal Power Commission (FPC) (Predecessor to the Federal Energy Regulatory Commission), the production was sold in interstate commerce to Michigan Wisconsin Pipe Line Company (hereinafter "Michigan Wisconsin"). When the well ceased to produce in January, 1969, Shell plugged and abandoned the well and released of record its lease covering the south half of section 26. In a similar manner other leases terminated, leaving a total

of 400 acres unleased. The release or termination of the leases returned the mineral interest rights to the landowners. Neither Shell nor Michigan Wisconsin sought abandonment authorization from the FPC under § 7(b) because of the cessation of service.

In 1974 and 1975 petitioner Texas Oil and Gas Corp. and others (hereinafter "TXO") secured new leases from the landowners. TXO drilled its Gingrich No. 1 Well on a portion of the 400 acres, commencing production on February 5, 1977. There was no production from 1969 to 1977 from any of the acreage involved, and of course, no delivery of any gas in interstate commerce during that period of time.

TXO has contracted with Delhi Gas Pipeline Corporation to sell and deliver the gas attributable to the 400 acres to Delhi within the State of Oklahoma, an intrastate sale.

TXO is not in any way affiliated with Shell. TXO has never contracted with Michigan-Wisconsin with respect to the sale of gas from the properties involved. TXO acquired none of its property interest by or through Shell, whether by assignment, reversion, or succession in interest. All of the facts, as set forth above, are stipulated in more detail in Appendix D.[1]

TXO sought a declaratory judgment from the United States District Court for the Western District of Oklahoma to quiet title to these oil and gas leases against claims that natural gas produced therefrom

[1] Petitioners adopt statements made in pages 1 through 8 (top two lines) of the original brief of Appellant Michigan-Wisconsin Pipeline Company. This detailed statement of the facts and issues is appended as Appendix D.

was dedicated to interstate commerce under the Natural Gas Act (NGA), TXO filed its complaint against Michigan Wisconsin and the FPC.

Both at the district court and at the court of appeals, the parties in this case framed the issues identically to those presented in *Wessely Energy Corporation* v. *Arkansas Louisiana Gas Co.*, 593 F.2d 917 (10th Cir. 1979) which was pending at the time this case was briefed. The district court judge, who was assigned *Wessely* as well as this case, based his decision on the legal conclusions he reached in *Wessely*. The district judge held that the natural gas produced from TXO's leases is not dedicated to interstate commerce.

In briefing on appeal, the parties noted the factual distinctions between this case and *Wessely* but treated the cases as legally identical. In fact, all parties filed the same briefs to the court of appeals that had been filed in the *Wessely* case. No oral argument was held in this case.

After briefs were filed and before the court of appeals issued its decision in this case, Congress passed the Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3350, (NGPA) which created a new comprehensive federal scheme for the regulation of natural gas.[2]

[2] As we stated above, this case was submitted to the court of appeals before the Natural Gas Policy Act of 1978 was passed by Congress. By letters dated November 15, 1978 and November 17, 1978, Howard E. Shapiro, Solicitor of the Federal Energy Regulatory Commission, requested that the Court enter a general order on all pending cases requiring Petitioners, et al, to submit memoranda regarding the effect of the Natural Gas Policy Act of 1978 and the implementing regulations. By letter dated December 18, 1978 (Appendix F) the court of appeals declined to do so until each case was calendared. By letter dated March 2, 1979, the Clerk

The court of appeals reversed the summary judgment issued by the district court in this case and remanded it with the instruction that the action be dismissed in deference to the primary jurisdiction of the Federal Energy Regulatory Commission to determine the issues before the parties.

The court of appeals decided that the *Wessely* case was not legally or factually identical to this case. Rather, the court concluded that the instant case is controlled by *California* v. *Southland Royalty Co.*, 436 U.S. 519 and *United Gas Pipeline Co.* v. *McCombs*, 47 U.S.L.W. 4728. Nothing in the decision of the court of appeals indicates that it considered whether the provisions of the NGPA affected the Commission's authority under the NGA or the applicability of this Court's opinions in *Southland* and *McCombs* to the undisputed facts presented in this case.

On August 21, 1979, TXO's petition for rehearing was denied by the court of appeals.[3]

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of the court of appeals assigned the case at bar to Calendar C without requesting the memoranda suggested by Mr. Shapiro's letter. It would appear, therefore, that the Court felt that the Act was not determinative of issues in this case.

[3] The petition for rehearing did not present any arguments as to the applicability of the NGPA to the facts of this case because of the Petitioners' belief at that time that *Wessely* still controlled. When the court of appeals reached the conclusion that *Wessely* did not apply, it turned to *Southland* and *McCombs* without the benefit of any briefing and argument on the NGPA. The NGPA is critical for it explicitly limits further extension of the holding of the *Southland* case.

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the effectuation of Congressional desire, by the enactment of Section 2(18)(B) of the Natural Gas Policy Act of 1978, 92 Stat. 3350, to limit the interpretation of Section 7(b) of the Natural Gas Act expressed by this Court earlier that year in *California* v. *Southland Royalty*, 436 U.S. 519. The court of appeals, despite a suggestion from the Solicitor of the Federal Energy Regulatory Commission that the court require briefing on the effect of the newly passed NGPA, apparently did not believe that Act to be relevant, and issued its decision ordering the complaint dismissed relying directly on this Court's decision in *Southland* and without mention of the NGPA. This was error that denies effect to the express desire of the Congress; it should be corrected by this Court.

1. Under Section 7(c) of the NGA, 15 U.S.C. § 717f (c), a producer who sells natural gas for resale in interstate commerce must obtain a certificate of public convenience and necessity from the Commission. As a general rule, Section 7(b) of the NGA, 15 U.S.C. § 717f(b), obligates these producers to continue supplying gas in the interstate market until the Commission authorizes abandonment.[4]

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[4] Section 7(b) provides: No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. 15 U.S.C. § 717f(b).

In a variety of factual situations, this Court has considered whether a producer may, consistent with Section 7(b), terminate its service obligation without obtaining the agency's express approval. *Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378; *Sunray Mid-Continent Oil Co.* v. *FPC,* 364 U.S. 137; *United Gas Pipe Line Co.* v. *FPC,* 385 U.S. 83; *California* v. *Southland Royalty Co., supra,* and *United Gas Pipe Line Co.* v. *McCombs, supra.* This Court stated in *Atlantic Refining Co.,* 360 U.S. at 392, that once gas has been dedicated to interstate commerce, "there can be no withdrawal of that supply from continued interstate movement without Commission approval." In *Sunray,* this Court held that gas remains dedicated even though the gas purchase contract has expired. 364 U.S. at 155. This Court then held in *Southland* that gas reserves underlying a leased acreage survives the reversion of the lease to the landowner, and that the landowner, therefore, is obligated to continue the certificated service unless abandonment authority is first obtained from the Commission, *California* v. *Southland Royalty Co.,* 436 U.S. at 527.

However, this is the first case to present questions of the extent that the NGPA alters the applicability of Section 7(b) of the NGA to producer sales, and of whether there is a limit to the regulatory authority of the Commission to require the continuation of interstate service.

Section 2(18)(A) of the NGPA defines the term "committed or dedicated to interstate comm ce" to include "natural gas which, if sold, would be required to be sold in interstate commerce (within the meaning of the Natural Gas Act) under the terms of any con-

tract, any certificate under the Natural Gas Act, or any provisions of such Act." [5]

However, Sections 2(18)(B) and 601(a)(1)(A) of the NGPA exclude certain categories of gas from the definition of the term "committed or dedicated to interstate commerce" and, therefore, exclude such gas from the requirements of the NGA.[6] The NGPA provides that for gas that qualifies under Section 2(18)(B)(iii), this exclusion is effective commencing December 1, 1978.

Section 2(18)(B)(iii) of the NGPA establishes a three-part test for determining whether gas is excluded from the definition of "committed or dedicated."

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[5] Section 2(18)(A) of the NGPA provides:

Committed or Dedicated to Interstate Commerce—

(A) General Rule—The term "committed or dedicated to interstate commerce", when used with respect to natural gas, means

(i) natural gas which is from the Outer Continental Shelf; and

(ii) natural gas which, if sold, would be required to be sold in interstate commerce (within the meaning of the Natural Gas Act) under the terms of any contract, any certificate under the Natural Gas Act, or any provision of such Act.

[6] Section 601(a)(1)(A) of the NPGA provides:

(a) Jurisdiction of the Commission Under the Natural Gas Act—

(1) Sales—

(A) Natural Gas not Committed or Dedicated—For purposes of section 1(b) of the Natural Gas Act, effective on the first day of the first month beginning after the date of the enactment of this Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to natural gas which was not committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act solely by reason of any first sale of such natural gas.

Gas is not committed or dedicated if (a) a reversion of a leasehold interest has occurred; (b) on May 31, 1978, neither the person whose action caused the gas to be dedicated to interstate commerce within the meaning of the NGA nor any successor in interest thereof "had any right to explore for, develop, produce, or sell such natural gas"; and (c) on May 31, 1978, the gas was not being sold in interstate commerce for resale, except under Section 6 of the Emergency Natural Gas Act of 1977, 15 U.S.C. § 727 note (expired), under a limited term certificate, under emergency sales authorized by the Commission, or to an end user pursuant to a certificate granted for the transportation of such gas.[7]

The Conference Report on the NGPA states that the purpose of this statutory exclusion is to limit this Court's holding in *Southland*.[8] The *Southland* decision had been handed down in May 1978, shortly before enactment of the NGPA on November 9, 1978. As the Conference Report indicates, Congress believed that the *Southland* decision created uncertainties concerning whether gas was committed or dedicated to interstate commerce. To remedy this uncertainty, Congress enacted Section 2(18)(B)(iii) of the NGPA which limits the prospective effect of the *Southland* decision by excluding from the definition of "committed or dedicated to interstate commerce", under the NGPA, gas that would otherwise be considered dedicated to interstate commerce under the NGPA by virtue of the decision in *Southland*.[9] By operation of Section 601(a)

[7] Section 2(18)(B)(iii) of the NGPA provides:

(B) Exclusion—Such term does not apply with respect to

(iii) natural gas which, but for this clause, would be committed or dedicated to interstate commerce under subparagraph (A)(ii) by reason of the action of any person (including any successor in interest thereof, other than by means of any reversion of a leasehold interest), if on May 31, 1978—

(I) neither that person, nor any affiliate thereof, had any right to explore for, develop, produce, or sell such natural gas; and

(II) such natural gas was not being sold in interstate commerce (within the meaning of the Natural Gas Act) for resale (other than any sale described in clause (i)(I), (II), or (III)).

[8] S. Rpt. No. 95-1126, 95th Cong., 2d Sess. (1978). This interpretation is supported by the legislative history found at pp. 71-72 of the Conference Report, which reads:

The conferees intend that the term "successor in interest" shall *exclude* any interest owner who acquires his right pursuant to the reversion or any other termination of a natural gas leasehold interest, or any subsequent grantee of such interest owner who acquires his interest after the date of such reversion or other termination.

The exclusion described in paragraph (C) above limits further extension of the holding of the Supreme Court in California, et al. v. Southland Royalty Co., et al (Slip Opinion No. 76-1114, decided on May 31, 1978). The case is not, however, reversed on its facts.

Under the exclusion, certain natural gas is not to be considered committed or dedicated, if such natural gas is committed or dedicated by reason of the action of any person and neither that person (or any successor in interest thereof) nor any affiliate, on May 31, 1978, had any right to explore for, develop, produce, or sell such natural gas. If the right to explore is vested in any other person by means of any reversion of a leasehold, such other person is not to be considered a successor in interest, and thus the natural gas would not be considered committed or dedicated, unless the gas is also sold in interstate commerce (within the meaning of the Natural Gas Act) for resale on May 31, 1978 (emphasis added).

[9] Congressman Dingell, the Chairman of the House Energy Subcommittee and one of the principal draftsmen of the NGPA, stated on the House floor:

However, as indicated on page 71 of the Statement of Managers; the term "successor in interests" excludes "any interest owner who acquires his right pursuant to the reversion or any other termination of a natural gas leasehold interest, or any subsequent grantee of such interest owner who acquires

(1)(A) then, the gas excluded from commitment or dedication to interstate commerce would be released from the NGA jurisdiction of the Commission as of December 1, 1978.

In this case, TXO's gas production, as the undisputed facts show, meets the three-pronged test of this section, and thus is not "committed or dedicated" under the NGPA as of December 1, 1978. First, the reversion of Shell's leasehold had occurred. Secondly, neither Shell nor any successor in interest to Shell had the right to explore for, develop, produce, or sell the subject gas. Lastly, no gas from the subject acreage has flowed in interstate commerce since 1969. The court of appeals erred by failing to apply this exclusion to the facts of this case.

By the passage of the NGPA, Congress created a comprehensive regulatory program that, unlike NGA regulation, does not rely upon the Commission's control over continuation of service as a fundamental component of federal regulation. Under the NGA, intrastate prices for gas were frequently considerably higher than interstate prices as regulated by the Commission.

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his interest after the date of such reversion or other termination." Thus the term "reversion," is utilized in Section 2(18)(B)(iii) is intended to include any process by which a natural gas leasehold interest or *part thereof* terminates and the lessee loses the right to explore for, develop, produce or sell natural gas from the acreage formerly covered by *such lease or part thereof*. Such processes include termination by *voluntary release*, by *a judicial cancellation decree*, or under the provisions of a lease which require termination if production is not established or if production is not maintained in *paying quantities*.

Thus, *the successor in interest chain is intended to be broken upon reversion of the leasehold interest to the landowner*. The term would then not apply to either the landowner, or a subsequent lessee who is not affiliated with the person by whose action the gas was dedicated to interstate commerce. (emphasis added) 124 Cong. Rec. H13,116 (daily ed. Oct. 14, 1978).

As this Court is aware, those price differentials made the divergence of gas from interstate to intrastate markets a very attractive economic opportunity. Consequently, the Commission was forced to take action in order to satisfy its statutory obligation to insure that gas dedicated to the interstate market was not diverted to the unregulated sector.

The regulatory scheme under the NGPA is dramatically different. It provides incentive prices considerably higher than the Commission promulgated "just and reasonable rates" for sales in interstate commerce under the NGA, and, in some instances, also higher than the intrastate prices charged by producers during the two years before the passage of the NGPA. Also, since all sales, whether interstate or intrastate, are subject to federal price control, until deregulation, there is no price advantage to making an intrastate sale. Consequently, producers under the NGPA would not be under the same economic pressure to divert gas to intrastate markets in order to obtain a higher price.

It was clearly the intent of Congress to substitute a uniform natural gas pricing policy for the bifurcated market that developed under the NGA. The court of appeals' failure to consider the NGPA seems to reconstruct, in part, the barrier between the intrastate and interstate markets that existed under the NGA but which was removed by the NGPA.

By failing to apply the NGPA to the facts of this case, by explicitly relying on *Southland,* and by remanding the case for dismissal with the prospect of further protracted litigation before the FERC, and almost certain appellate review thereafter, the court of appeals decision has given rise to an additional

lengthy period of uncertainty as to whether the gas produced by TXO from a new lease was or is committed or dedicated to interstate commerce.

The elimination of just this type of uncertainty was one of the purposes for the inclusion of the *Southland* exclusion in Section 2(18)(B) of the NGPA.[10] Moreover, in the gas industry it is extremely common for the original production from a property to be depleted, have the wells plugged and abandoned, see the lease revert to the landowner, and then some time later see a new lessee-operator consider whether to risk new capital to drill in search of new production. We believe, therefore, that contrary to the purposes of the NGPA, the court of appeals' decision will discourage producers from exploring for and developing natural gas resources in domestic fields that were abandoned as uneconomical.

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[10] Congressman Dingell stated unequivocally during the Congressional debates on the NGPA that:

> Section 2(18)(B)(iii) establishes an exemption from the definition of the term "committed or dedicated" which is used throughout the bill. The purpose of this provision is to deal with issues raised by the Supreme Court's decision in *California* v. *Southland Royalty Co.*, decided May 31, 1978.
>
> The potential for extension of the holding of the *Southland* case has cast a cloud of uncertainty over the question whether natural gas production is interstate or intrastate in character. This in turn may hamper financing of new natural gas wells and cause disuption of gas supplied to intrastate natural gas consumers.
>
> This legislation is intended to substitute a uniform natural gas pricing policy for the bifurcated system of regulation under the Natural Gas Act. The legislation seeks to encourage expanded exploration for, and development of, the Nation's natural gas resources and provide reliable supplies of gas to both interstate and intrastate pipelines. These objectives would be frustrated if the uncertainties created by the *Southland* case were not addressed. 124 Cong. Rec. H13,115 (daily ed. Oct. 14, 1978).

2. Since the statutory exclusion of the NGPA applies to the facts in this case, we believe the court of appeals erred in holding that this case is controlled solely by *Southland* and *McCombs*. However, if the NGPA did not apply to the facts of this case, we believe that this Court's decisions in *Southland* and *McCombs* are not applicable to the facts of the instant case.

In *Southland,* the landowners executed a fifty-year lease with a lessee to develop the gas and oil from the land covered by the lease. The landowner subsequently sold to Southland Royalty and others the rights to any minerals remaining in the property at the end of the lease. The lessee sold gas produced from the lease to an interstate pipeline pursuant to a certificate of unlimited duration granted by the FPC. When the fifty-year lease expired, the lessee's interest in the remaining oil and gas reserves terminated and reverted, by operation of state law, to Southland Royalty and the other reversioners. The reversioners attempted to cease sales to the interstate pipeline and to sell the remaining gas in the intrastate market.

The facts in the instant case vary significantly from those in the *Southland* case. The earlier leases, which were held by Shell, had terminated and production had ceased in 1969. New leases were taken by TXO. TXO did not obtain its interest upon the reversion of the leases from Shell to the landowner, as in the case of the Southland mineral owners. TXO has not placed any lessee in a position to dedicate supplies to interstate consumers. The undisputed facts show that the supply of gas dedicated by Shell in its contract with Michigan Wisconsin has been depleted. Thus, the commitment to interstate commerce was satisfied in that

everything that was certificated to the interstate market had been delivered.

Unlike as in *Southland,* TXO does not in this case seek to interrupt the flow of dedicated gas. This gas is a new supply, produced from new leases, by a new lessee, without any prior affiliation with any prior interest owner. As we stated above, there was no production of gas from 1969 to 1977 from the 400 acres involved, by Shell, or anyone else. The holding of the court of appeals in effect permits the dedication of leases that Shell neither owned nor, in fact, were even in existence until several years after expiration of the Shell leases and the depletion of the gas dedicated by Shell.

As to *McCombs,* the factual situation is also vastly different. Billy McCombs was a clear successor in interest to a dedicated lease, which was under contract to the United Gas Pipe Line Company until 1981. The lease, the Butler B. lease, which was covered by the United contract, was still in existence. Furthermore, at one point in the chain of title, when H. A. Pagnkopf obtained the leasehold in 1961, he extended United's gas purchase contract through February 7, 1981. In short, Billy McCombs was the holder of the original oil and gas lease which was still under contract to United until February, 1981.

In the instant case the leases owned by TXO are not, and never have been, under any contract to Michigan Wisconsin. TXO did not take assignments of leases from a party who had previously contracted with respect to such leases. In *McCombs,* however, the producer took an assignment of a dedicated lease under contract to United until the year 1981. This fact does not exist here.

3. In *Southland,* the lessee of the reversionary mineral owners, acting under a duty to market the gas he discovered and produced, placed gas in interstate commerce which at the time the reversion occurred was still flowing in interstate commerce. These facts do not exist in the instant case. In this case, the public received the gas that Shell dedicated to interstate commerce. To hold that the dedication should survive to bind an unrelated party spending new money to drill new wells on new leases is improper and unwarranted. Such a holding deprives the Petitioners of the right to contract with respect to their property interests in the oil and gas leasehold estates even though there does not exist in this case any contractual basis (as in *McCombs*) or any overriding public interest in the supply of gas (as in *Southland*). Such a holding violates basic property law in all fifty states and constitutes a taking of property without due process, in violation of the Fifth Amendment of the United States Constitution.

Furthermore, it appears that the court of appeals' procedural mandate, which orders dismissal of Petitioners' cause of action in deference to the "primary jurisdiction of the FERC", grants the relief requested by Michigan Wisconsin and FERC and, that is to require Petitioners to file an application for abandonment under Section 7(b) of the NGA.[11] Presumably,

[11] 15 U.S.C. § 717f(b). In the court of appeals, as above indicated, all parties filed copies of briefs that had been used in the *Wessely* case. These briefs contained a considerable amount of legal authority, by all parties, on the administrative law questions of "primary jurisdiction" and "exhaustion of administrative remedies". In deference to the mandate of Rule 23 requiring brevity (Rule 23, Section 4) Petitioners here will not burden the Court with these authorities. Since the court of appeals made no mention of any of such authorities and made no reference to either primary jurisdiction or exhaustion of administrative remedies until the last sentence of its opinion. (See Appendix A).

the Petitioners are required to seek an abandonment of the certificate issued to Shell in 1960. The procedural irrationality of such an order is apparent on the face of Section 7(b) which reads as follows:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. 15 U.S.C. § 717f(b).

It is implicit in this provision that the natural-gas company which obtains the certificate should seek the abandonment. In the second line the reference is to "its facilities"; those would be Shell's facilities in this case.

The statute requires that the applicant for abandonment be either the natural gas company that obtained the certificate of its successor to that certificate.[12]

[12] This interpretation is consistent with the regulations of the Commission. Attached as Appendix E is Section 157.18 of the Commission's regulations which sets forth the requirements of an application to abandon facilities or service. These requirements include "flow diagram showing the daily design, capacity and reflecting the operation of applicant's system after abandonment, the impact upon customers whose service will be terminated, the effect of abandonment on existing tariffs, the accounting treatment of the abandonment and the location of the facilities to be abandoned." All of this information would have been in the hands of Shell in 1969, but none of it is available to these Petitioners. It is clear that Section 7(b) and these regulations contemplate that the holder of the certificate is the one who should seek the abandonment.

Clearly, TXO is neither the company that obtained the certificate nor the successor to that certificate.

In short, the decision of the court of appeals results in both the taking of Petitioners' property without due process of law and this procedural absurdity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Storey, Armstrong, Steger & Martin
5400 First International Building
Dallas, Texas 75270

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Attorneys for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 78-1215 and 78-1216

TEXAS OIL & GAS CORPORATION, WESSELY ENERGY CORPORATION, GREENBRIER 74 LIMITED, ZOLLER & DANNENBERG, INC., and JOSEPH K. CASKEY, *Plaintiffs-Appellees,*

v.

MICHIGAN WISCONSIN PIPE LINE COMPANY, and the FEDERAL ENERGY REGULATORY COMMISSION,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Oklahoma
(D.C. No. CIV. 77-0301-B)

Filed: July 17, 1979

Submitted on the briefs:

James W. Shepherd and William J. Legg of Andrews, Mosburg, Davis, Elam, Legg & Bixler, Inc., Oklahoma City, Oklahoma, for Appellant Michigan Wisconsin Pipe Line Company.

Robert R. Nordhaus, General Counsel, Howard E. Shapiro, Solicitor, and McNeill Watkins II, Attorney, of the Federal Energy Regulatory Commission, Washington, D.C., for Appellant Commission.

Robert M. Martin, Jr. of Storey, Armstrong, Steger & Martin, Dallas, Texas, and Stanley L. Cunningham, Philip D. Hart and Terry R. Barrett of McAfee, Taft, Mark, Bond, Rucks & Woodruff, Oklahoma City, Oklahoma, for Appellee Texas Oil & Gas Corporation.

Before SETH, Chief Judge, DOYLE and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

This is an appeal from a district court order granting a motion for summary judgment made by Texas Oil & Gas Corporation and the other plaintiffs-appellees (hereinafter collectively Texas Oil) claiming an interest in natural gas production from the tract of land at issue. The court held that any gas produced from the designated leasehold interests is not dedicated to delivery in interstate commerce, and it quieted title against the claim of Michigan Wisconsin Pipe Line Company (Michigan Wisconsn) to a rght to acquire the production, and against the contention of the Federal Energy Regulatory Commission (FERC) that it had primary jurisdiction to determine the question whether the gas production is dedicated to interstate commerce.

Whether the district court should have decided the dedication issue, or should have dismissed the action, requiring litigation before the FERC as the agency with primary jurisdiction to decide the issue, is the question to be decided in the instant appeal.

Texas Oil holds valid oil and gas leases covering 400 acres in Section 26, Township 22 North, Range 17 West, Woodward County, Oklahoma which is operated as part of a unitized tract for production purposes. Shell Oil Company held similar interests in this land from 1956 to 1970. During that time Shell entered into a gas purchase agreement with Michigan Wisconsin, committing all natural gas produced from these lands to the pipeline. Michigan Wisconsin also executed a similar gas purchase agreement with Sam K. Viersen covering other interests in the unitized tract. The gas purchase agreement between Shell (and Viersen) and Michigan Wisconsin was conditioned upon the parties receiving certificates of public need from the Federal Power Commission (FPC, now FERC). Apparently the certificates were issued.

Shell drilled a successful well in 1962, delivering all natural gas production to Michigan Wisconsin until January 1969 when Shell abandoned and plugged the well with the permission of the Oklahoma Corporation Commission. Shell never applied to the FPC for permission to abandon its well on the tract.

A few years later, Texas Oil obtained the oil and gas leases at issue here on the same property, and entered into a gas purchase agreement with Delhi Gas Pipeline Corporation to deliver *intrastate* all natural gas produced from the leaseholds. Texas Oil drilled a well to the same formation (Chester) from which the Shell well had produced, although on a different quarter section of the unitized tract. The new well was a producer and Texas Oil started delivering natural gas to Delhi on February 5, 1977, and continues to do so.

After one month of production Texas Oil filed the complaint in this case against the FERC and Michigan Wisconsin, seeking a declaratory judgment that the natural gas produced from these oil and gas leases is not dedicated to interstate commerce, and quieting its title against Michigan Wisconsin's claim the gas must be sold to it because of the prior certificate of need issued by the FPC dedicating the gas from these lands to interstate commerce.

The parties frame the issues identically to those presented in Wessely Energy Corp. v. Arkansas Louisiana Gas Co., 593 F.2d 917 (10th Cir. 1979), which was pending at the time this case was briefed. The same district court judge was assigned this case and based his decision on the legal conclusions he reached in *Wessely*. In briefing the appeal the parties noted the factual distinctions between this case and *Wessely*, but treated the cases as legally identical. We do not agree.

In *Wessely* a natural gas production company, Aquitaine, executed a gas purchase contract with an interstate pipeline to sell all of its production from an area describing more than one million acres (1500-1600 square miles), on much of which land it had no leases. Approximately two years later it became one-half owner of a lease on the land at issue in the case. But it did not drill on the land, nor did anyone else, during the term of the lease. The lease did not become part of any unitized producing tract, nor was any production obtained from any reservoir underlying the tract. After the lease expired, unlike the situation in Amarex, Inc. FERC, No. 77-1503 (10th Cir. filed July 17, 1979), the landowners leased to a company unrelated to Aquitaine, which had no contract for delivery to interstate commerce. We held the new lessee was not encumbered by Aquitaine's agreement:

> Under ordinary standards Arkla's contract thus never became operative or applicable as to Aquitaine's leasehold interest in this tract, and it is this contract claim which plaintiff seeks to remove by this action. The only basis advanced for Arkla's position that its gas purchase contract somehow attaches to the "land" is, of course, by an application of the Natural Gas Act. But again, with no drilling, no production, no facilities, there was no introduction of gas into the interstate market or any market. The Natural Gas Act was never applicable to this tract along with the vast areas of other undeveloped lands.

593 F.2d at 919-920.

Unlike *Wessely*, natural gas was produced and sold in interstate commerce for seven years from the tract at issue in the instant case. Indeed, it was from the same production zone as the new well whose production is sought to be required to be sold to Michigan Wisconsin. This case is controlled by California v. Southland Royalty Co., 436

U.S. 519 (1978), and United Gas Pipe Line Co. v. McCombs, 47 U.S.L.W. 4728 (June 18, 1979).

Southland held that once gas begins to flow into interstate commerce the flow cannot be terminated without FERC approval:

> Once the gas commenced to flow into interstate commerce from the facilities used by the lessees, § 7(b) required that the Commission's permission be obtained prior to the discontinuance of "any service rendered by means of such facilities."

436 U.S. at 527.

It also ruled the obligation survives the expiration of the lease, and can be imposed upon a party who does not hold the interstate certificate.

McCombs held that once FERC jurisdiction attaches a well cannot be abandoned without first acquiring the permission and approval of the Commission under Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b). This was applied even though the well had been abandond in fact for several years and because it could not produce gas in commercial quantities. The Court's rationale was based upon the right of the Commission to require further exploration or other measures to assure the continuing supply of gas dedicated to interstate commerce:

> Requiring Commission approval, "after due hearing," permits all interested parties to be heard and therefore facilitates full presentation of the facts necessary to determine whether § 7(b)'s criteria have been met. Contrary to respondent's assumption, . . . the Commission does not automatically approve abandonments whenever production has ceased. Indeed, the agency recently refused to grant an application where the producer had not adequately tested for new gas reserves. Had the lessees in the instant case filed an

application for abandonment between 1966 and 1971, United might well have demonstrated that exploration of the leasehold had been insufficient to justify finding "the available supply of natural gas . . . depleted to the extent that the continuance of service [was] unwarranted." Section 7(b). And the Commission might have concluded that production from deeper reserves or other measures to restore service were feasible. Permiting natural gas companies to bypass abandonment proceedings simply because known reserves appear depleted would obviously foreclose these factual inquiries. Consequently, the abandonment determination would rest, as a practical matter, in the producer's control, a result clearly at odds with Congress' purpose to regulate the supply and price of natural gas. See *California* v. *Southland Royalty Co.*, 436 U.S. at 526-527, 529-530; *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S., at 142-147. (Footnote omitted.)

47 U.S.L.W. at 4731.

In the instant case, although permission for the abandonment was granted by the Oklahoma Corporation Commission, there was never any proceeding before the FERC. Therefore, we reverse and remand the case with instructions that the action be dismissed, in deference to the primary jurisdiction of the FERC to determine the issues between the parties.

APPENDIX B

JULY TERM—August 21, 1979

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe C. McKay, and Honorable James K. Logan, Circuit Judges

No. 78-1215 and No. 78-1216

TEXAS OIL & GAS CORPORATION, WESSELY ENERGY CORPORATION; GREENBRIER 74 LIMITED; ZOLLER & DANNENBERG, INC., and JOSEPH K. CASKEY, *Plaintiffs-Appellees,*

vs.

MICHIGAN WISCONSIN PIPE LINE COMPANY and FEDERAL ENERGY REGULATORY COMMISSION, *Defendants-Appellants.*

This matter comes on for consideration of appellees' petition for rehearing filed in the captioned cases, and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Seth, Doyle and Logan, to whom the cases were argued and submitted.

The petition for rehearing having been denied by the panel to whom the cases were argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips, Clerk

APPENDIX C

Natural Gas Act 15 U.S.C. § 717, *et seq.*

§ 717(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas to the local distribution of natural gas or to the facilities used for such distribution or to the production of gathering of natural gas. (emphasis added.)

§ 717(a)(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

§ 717f(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: . . ."

§ 717f(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

APPENDIX D

STATEMENT OF THE ISSUES

The issues presented by this appeal are:

1. (a) Does the Federal Power Commission (now known as the Federal Energy Regulatory Commission, and hereafter in this brief, "F.E.R.C." or "Commission") have the primary jurisdiction to decide the issues presented in the Complaint filed by Texas Oil & Gas Corporation, Wessely Energy Corporation, Greenbriar 74 Limited, Zoller & Dannenberg, Inc., and Joseph K. Caskey (hereinafter collectively referred to as "Texas Oil")?

(b) Must Texas Oil exhaust its administrative remedies with the Commission?

2. Must Texas Oil sell and deliver any of the natural gas produced from or in respect of the South half, the North one-half of the Northwest quarter, and the South half of the Northeast quarter of Section 26, Township 22 North, Range 17 West, Woodward County, Oklahoma to Michigan Wisconsin Pipe Line Company ("Michigan Wisconsin") for the supply of Michigan Wisconsin's interstate pipe line system, pursuant to a gas purchase contract between Michigan Wisconsin and Shell Oil Company ("Shell") dated August 24, 1960 and a gas purchase contract between Michigan Wisconsin and Sam K. Viersen dated June 23, 1961 and or the Certificate of Public Convenience and Necessity issued by the FPC until Texas Oil has obtained abandonment authorization from the Commission under Section 7(b) of the Natural Gas Act?

STATEMENT OF THE CASE

I.

Nature of the Action

The original Complaint (Record, p. 1) was filed by Texas Oil seeking relief under the provisions of the Federal Declaratory Judgment Act seeking judgment declaring that:

(1) Texas Oil's oil and gas interests are free and clear of Michigan Wisconsin's alleged dedication to interstate commerce of any gas which may be discovered and produced from or attributable to said oil and gas interests;

(2) Texas Oil's title to said oil and gas leasehold estates be quieted against Michigan Wisconsin's claim that said oil and gas interests are subject to Michigan Wisconsin's gas purchase contract or that the production from said lease is otherwise committed to sale in interstate commerce.

II.

Course of the Proceedings

In response to Texas Oil's Complaint, the F.E.R.C. filed a Motion to Dismiss with Memorandum of Points and Authorities (Record, p. 14) seeking dismissal of the action because the court was without jurisdiction over the subject of the action. In its Memorandum of Points and Authorities supporting the motion, the Commission referred to a prior action before the district court, *Wessely Energy Corp. v. Arkansas Louisiana Gas Company*, et al., CIV-77-0159-B, 438 F.Supp. 360 (W.D. Okla., 1977), in which the same court had sustained a Motion to Dismiss involving a factual situation materially the same as that presented in this case, and invited the district court to follow its ruling in this case.

In response to Texas Oil's Complaint, Michigan Wisconsin filed an Answer (Record, p. 11), in which it adopted the position of the Commission.

Texas Oil filed a Memorandum Brief in Response to the Motion to Dismiss and to Michigan Wisconsin's Answer, (Record, p. 30), treating the Answer as having the effect of a Motion to Dismiss by virtue of its adoption of the position of the Commission. Texas Oil therein identified the case as having a posture substantially the same as the Wessely Energy case had at the time of a hearing in that case

on June 3, 1977. The record in that case will reflect that the district court vacated its Order of Dismissal and overruled the motions of the defendants of that case to dismiss. In its Memorandum some factual differences between the Wessely case and the case at hand were pointed out, and Texas Oil supplied as an exhibit to that Response a copy of its Memorandum Brief that had been filed in the Wessely Energy case.

The court overruled the Motion to Dismiss by order of August 8, 1977 (Record, p. 68).

The Commission filed its Answer (Record, p. 69).

Texas Oil filed its Motion for Summary Judgment (Record, Vol. II), to which Michigan Wisconsin responded by referring to the Wessely Energy case and in effect adopted the arguments and authorities previously presented by Arkansas Louisiana Gas Company and the Commission in that case (Record, p. 81). The Commission filed its response to the Motion for Summary Judgment also by adopting the arguments it had made in the Wessely Energy case.

The Motion for Summary Judgment was granted by the court in its Order and Judgment (Record, p. 84).

From this Order and Judgment notices of appeal were filed by Commission (Record, p. 85) and by Michigan Wisconsin (Record, p. 88).

III.

Disposition of the Proceedings in the Lower Court

Texas Oil's Motion for Summary Judgment was granted by Order and Judgment rendered and filed January 19, 1978 (Record, p. 84).

IV.

Statement of the Facts

The following are the pertinent facts of this case:

1. On August 24, 1960 Shell Oil Company, as "seller", and Michigan Wisconsin, as "buyer", entered into a gas purchase contract under the terms of which Shell committed to Michigan Wisconsin gas attributable to Shell's interest in certain gas reserves underlying lands and leaseholds referred to therein, a portion of which involved the South half of Section 26, Township 22 North, Range 17 West, Woodward County, Oklahoma. (Record, Vol. II, Motion for Summary Judgment, p. 3.)

2. Michigan Wisconsin entered into another gas purchase contract, with Sam K. Viersen, as seller, dated June 23, 1961, committing to Michigan Wisconsin the gas attributable to a reversionary interest owned by Sam K. Viersen under which Sam K. Viersen would have participated in production from the Shell No. 1 Garvie Well following production sufficient to payout the cost of the well. Viersen's reversionary interest related to an undivided one-half interest in the South half of the Northeast quarter and the North half of the Northwest quarter of said Section 26. The reversionary interest was to vest into Sam K. Viersen upon payout of the No. 1 Garvie Well pursuant to a letter agreement between Shell and Viersen dated January 14, 1958. (Record, Vol. II, Motion for Summary Judgment, p. 4.)

3. Section 26 was designated as a 640 acre drilling and spacing unit for the production of gas and gas condensate from the Chester formation underlying said land pursuant to Oklahoma Corporation Commission Order No. 35186, issued on July 19, 1957. (Record, Vol. II, Motion for Summary Judgment, p. 2.)

4. Shell drilled its No. 1 Garvie Well, located in the approximate center of the Northeast quarter of the Northeast quarter of such Section 26, and completed the well as a producer of gas and gas condensate from the Chester formation. Michigan Wisconsin received delivery of the gas produced from the No. 1 Garvie Well attributable to its

gas purchase contract with Shell, commencing in October, 1962, and continued to receive the same into its interstate pipe line system until production ceased in January, 1969. Shell thereupon plugged and abandoned the No. 1 Garvie Well and released of record its lease covering the South half of Section 26. (Record, Vol. II, Motion for Summary Judgment, p. 3.)

5. The reversionary interest of Sam K. Viersen expired without vesting in Sam K. Viersen for the reason that payout was never achieved. (Record, Vol. II, Motion for Summary Judgment, p. 4.)

6. In 1974 and 1975 a series of oil and gas leases were obtained under which Texas Oil and the other plaintiffs acquired their interests in the gas underlying the South half of Section 26, and other acreage in Section 26 totalling 400 acres. (Record, Vol. II, Motion for Summary Judgment, p. 2.)

7. On December 22, 1976 Texas Oil entered into a gas purchase agreement with Delhi Gas Pipeline Corporation (Delhi) under the terms of which Texas Oil committed to Delhi gas that may be purchased from leasehold estates of Texas Oil described therein, which Delhi Gas Pipeline Corporation agreed to buy. (Record, Vol. II, Motion for Summary Judgment, p. 5.)

8. Texas Oil drilled its Gingrich No. 1 Well located in the Southeast quarter of Section 26, producing natural gas from the Chester formation. Delivery of gas produced from that well to Delhi Gas Pipeline Corporation commenced on February 5, 1977, and continues. (Record, Vol. II, Motion for Summary Judgment, p. 5.)

9. The contract of Delhi provides that all gas sold to and taken by Delhi thereunder shall be transported and sold for ultimate consumption within the state of Oklahoma. The gas available for sale and delivery to Delhi under the contract is that portion of production from the Gingrich No. 1

Well which is attributable to the leasehold interests owned by Texas Oil. (Record, Vol. II, Motion for Summary Judgment, p. 5.)

10. Texas Oil is not affiliated with Shell, and Texas Oil has never contracted with Michigan Wisconsin with respect to the sale of gas that may be produced from the particular properties which are the subject of the Texas Oil leasehold estate. (Record, Vol. II, Motion for Summary Judgment, p. 5.)

RELATION TO ANOTHER APPEAL PENDING IN THIS COURT

The disposition of this case in the District Court was based upon the disposition in that court of a case decided while this case was then pending, and the decision of the case was expressly said in the Order and Judgment of the court to follow the decision in the Wessely Energy case. Appeals taken in that case are now pending in this court, No. 77-1749 and No. 77-1750, wherein Wessely Energy Corporation is the plaintiff-appellee and Arkansas Louisiana Gas Company and Federal Power Commission are appellants. The cases are very similar in all material respects. With the recognition of slight differences, which are not believed to be material, it is the desire of Michigan Wisconsin to adopt the arguments and authorities presented by the appellant, Arkansas Louisiana Gas Company in its brief in No. 77-1749 in this court, in respect of the principal points, as hereinafter referred to.

The factual differences between this case and the Wessely Energy case are seen in the following:

1. The production from the Shell No. 1 Garvie Well from 1962 to 1969 was from one of the specific tracts of land which is the subject of Texas Oil's action in this case, and from within the 640 acre spacing unit established by order of the Oklahoma Corporation Commission, comprised of this same Section 26. In the Wessely Energy case prior

production achieved by Aquitaine and delivered to Arkansas Louisiana Gas Company was from entirely different acreage than that which was the specific subject of that suit, but was within the larger acreage encompassed by the gas purchase contract between Aquitaine and Arkansas Louisiana Gas Company. In both instances the gas from the earlier wells were delivered into interstate commerce and subject to the regulation by the Federal Power Commission. The gas taken by Michigan Wisconsin in this case, however, came from the same section of land constituting the spacing unit, and hence the proceeds of the sale of such gas has been shared according to their interests by all of those having an interest in the entire 640 acres. To that extent, therefore, production from the Shell No. 1 Garvie Well was allocable to the South half of said Section 26 which is the subject of Texas Oil's complaint herein.

2. In the Wessely Energy case the new leases constituted "top leases", leases obtained prior to expiration of the former leases, to take effect upon such expiration of the former leases. The new leases were obtained by the same lessee, Wessely Energy, who had the prior leases. In the present case the expiration of the Shell lease occurred pursuant to their terms as a result of the cessation of production, upon which Shell plugged and abandoned the well.

These differences are not deemd material to issues in this appeal. (emphasis added).

APPENDIX E

Chapter I—Federal Energy Regulatory Commission

Title 18—Conservation of Power, Water Resources

§ 157.18 Applications to abandon facilities or service: exhibits.

Applications for an order authorizing abandonment of facilities or service pursuant to section 7(b) of the Natural Gas Act shall contain a statement setting forth in detail the reasons for the abandonment and shall contain the exhibits listed below. Together with each exhibit, applicant shall set forth a full and complete explanation of the data submitted, the manner in which it was obtained, and the reasons for the conclusions which they are derived therefrom. The Secretary may, in addition, require that the testimony of all witnesses to be presented by the applicant be filed together with all exhibits upon which applicant will base its case-in-chief.

(a) *Exhibit T—Related applications.* A statement showing:

(1) The docket numbers of the prior proceedings in which the facilities or services sought to be abandoned were certificated.

(2) The docket numbers of related applications pending before or which have been authorized by the Commission with an explanation of the interrelationship of those applications with the instant application.

(b) *Exhibit U—Contracts and other agreements.* A conformed copy of each contract or other agreement pertaining directly or indirectly to the abandonment of facilities or service, including all agreements which influenced applicant to seek the abandonment and all agreements which are dependent upon the approval of the proposed abandonment.

(c) *Exhibit V—Flow diagram showing daily design capacity and reflecting operation of applicant's system after abandonment.* A flow diagram showing daily design capacity and reflecting operating conditions of applicant's system after abandonment of facilities on that segment of the system affected by the abandonment, including the following:

(1) Diameter, wall thickness, and length of pipe remaining.

(2) *For each remaining compressor station, the size, type* and number of compressor units, horsepower required, horsepower installed. Volume of gas to be used as fuel, suction and discharge pressures, and compression ratio.

(3) Pressures and volumes of gas at the main line inlet and outlet connections at each compressor station.

(4) Pressures and volumes of gas at each intake and takeoff point and at the beginning and terminus of all remaining facilities.

(d) *Exhibit W—Impact on customers whose service will be terminated.* A statement indicating the availability of natural gas from other sources to applicant's customers whose service will be terminated by the abandonment and a statement showing the economic effect of the abandonment on applicant's customers. If no other natural gas is available, indicate the availability of other fuels to those customers and explain why the abandonment of service to each customer is permitted by the public convenience and necessity.

(e) *Exhibit X—Effect of the abandonment on existing tariffs.* A statement showing the effect of the proposed abandonment upon any rate schedules or tariffs on file with this Commission, together with pro forma rate schedule sheets, notices of cancellation, or other tariff filings required to be made with this Commission.

(f) *Exhibit Y—Accounting treatment of abandonment.* Concisely describe the changes of property, indicating the cost of property to be abandoned in place, the cost of property to be removed and salvaged, the proposed disposition

of salvaged material, and a description of equipment to be relocated setting forth its cost, its proposed new location, and the extent of rehabilitation required. Include the information required below.

(1) State the proposed accounting treatment for property changes, showing, for example, retirements by primary plant accounts, cost of removal, salvage realized for materials and equipment sold, original cost of reusable materials and equipment recovered (see Account 154 of the Uniform System of Accounts), and maintenance costs for reconditioning of reusable materials and equipment.

(2) If the abandonment will be by sale of property, describe the property to be sold, together with the proposed accounting treatment as required by paragraph F of Gas Plant Instruction 5 of the Uniform System of Accounts. Applicant may use pro forma accounting entries based on estimated amounts, provided that upon consummation of the sale he must file proposed accounting entries in conformity with the requirements of the Uniform System of Accounts. If the proposed sale will result in a taxable gain to the applicant, indicate the amount of federal and state income taxes to be allocated to the gain. If no allocation is to be made, explain the reasons.

(3) State the amount of accumulated deferred income taxes attributable to the property to be abandoned. Indicate the proposed accounting treatment of those accumulated deferred taxes.

(g) *Exhibit Z*—Location of facilities. Unless shown on Exhibit V or elsewhere, a geographic map of suitable scale and detail showing, and appropriately differentiating between, all of the facilities proposed to be abandoned and the other existing facilities of applicant, the operation or capacity of which will be directly affected by the facilities to be abandoned. This map shall clearly show the relationship of the facilities to be abandoned to the applicant's overall system and shall include:

(1) Location, length and size of pipelines.

(2) Location and size (rated horsepower) of compressor stations.

(3) Location and designation of each point of connection of existing facilities with (i) main line industrial and other consumers, pipeline or distribution companies and municipalities, indicating towns and communities served at wholesale or retail and (ii) gas-producing and storage fields, or other sources of gas supply. Designate on the map those facilities and services proposed to be abandoned.

[Order 280, 29 FR 4879, Apr. 7, 1964, as amended by Order 295, 30 FR 4130, Mar. 30, 1955]

APPENDIX F

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Office of the Clerk

469 United States Courthouse
Denver, Colorado 80294

December 18, 1978

Mr. Howard E. Shapiro
Solicitor
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, D.C. 20426

Re: Nos.
77-1503, Amarex, Inc. v. F.E.R.C.
78-1101, General Motors Corporation v. F.E.R.C.
77-1993, Getty Oil Company v. F.E.R.C.
78-1215 and 78-1216, Texas Oil & Gas Corporation, et al. v. Michigan Wisconsin Pipe Line Company, F.E.R.C.
77-1749 and 77-1750, Wessely Energy Corporation v. Arkansas Louisiana Gas Company, F.E.R.C.
78-1575 and 78-1691, Woods Petroleum Corporation v. Arkansas Louisiana Gas Company, F.E.R.C.
77-1781, State Corporation Commission of Kansas v. F.E.R.C.; 77-1786, Gas Service Company v. F.E.R.C.; 77-1789, Jackson County, Missouri v. F.E.R.C.; 77-1809, Cities Service Gas Company v. F.E.R.C.

Dear Mr. Shapiro:

Your letters of November 15, 1978, and November 17, 1978, were submitted to our Court.

You suggested that the Court enter a general order in all pending cases requiring petitioners, et al. to submit a memorandum regarding the effect the Natural Gas Policy Act of 1978, P.L. 95-621, 92 stat. 3350, and the implementing regulations (43 Fed. Reg. 53270, published November 15, 1978) would have on the pending appeals in our Court.

The Court has instructed me to advise you that the matter of new legislation will be considered in the several cases as they are heard or reviewed for calendaring. No general order will be entered at the present time.

Very truly yours,

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

HRP:cb

cc: Mr. Stanley L. Cunningham, Mr. Philip D. Hart, Mr. Terry R. Barrett, McAfee, Taft, Mark, Bond, Rucks & Woodruff, Fifth Floor, One Hundred Park Avenue Building, Oklahoma City, Oklahoma 73102
Mr. James R. Patton, Jr., Mr. David B. Robinson, Patton, Boggs & Blow, 1200 Seventeenth Street, N.W., Washington, D.C. 20036
Mr. Harry E. Barsh, Jr., Camp, Carmouche, Palmer, Carwile & Barsh, 1200 Seventeenth Street, N.W., Washington, D.C. 20036
Mr. Reuben Goldberg, Mr. Glenn W. Letham, Goldberg, Fieldman & Hjelmfelt, 1700 Pennsylvania Avenue, N.W., Washington, D.C. 20006
Mr. Edward J. Grenier, Jr., Mr. Richard P. Noland, Mr. Louis Flax, Mr. William H. Penniman, Southerland, Asbill & Brennan, 1666 K Street, N.W., Washington, D.C. 20006

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Mr. Jeremiah D. Finnegan, Vold, Sullivan, Finnegan, Gordon, & Williams, 672 Crown Center, 2400 Pershing Road, Kansas City, Missouri 64108

Mr. Stanley Christopher, Office of the County Counselor, 415 East 12th Street, Kansas City, Missouri 64106

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Mr. William H. Reeder, Vice President & General Counsel, Union Gas System, Inc., P. O. Box 347, Independence, Kansas 67301

Mr. William A. Mogel, Ross, Marsch & Foster, 730 Fifteenth Street, N.W., Washington, D.C. 20005

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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-530

TEXAS OIL & GAS CORP., GREENBRIAR 74 LIMITED, ZOLLER & DANNENBERG, INC., JOSEPH K. CASKEY and WESSELY ENERGY CORPORATION,
Petitioners
v.
MICHIGAN WISCONSIN PIPE LINE COMPANY and the FEDERAL ENERGY REGULATORY COMMISSION,
Respondents

RESPONSE BY MICHIGAN WISCONSIN PIPE LINE COMPANY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondent Michigan Wisconsin Pipe Line Company accepts all of the preliminary and background statements of Petitioners and the material supplied in the appendices to their Petition. This Respondent therefore submits herein only its reasons for denying the Writ.

REASONS FOR DENYING THE WRIT

The commitment or dedication of the gas underlying the lands covered by Petitioners' leases to interstate commerce was clearly

established by production and sale of the gas in interstate commerce pursuant to appropriate certificates of public convenience and necessity, from 1962 until January, 1969. Under the cases cited by petitioners on page 8 of their Petition for Writ of Certiorari, that dedication could be withdrawn only with the express approval of the regulatory agency, now the Federal Energy Regulatory Commission. Abandonment authority must first be obtained under the regulatory procedure, pursuant to the provisions of Section 7(b), of the Natural Gas Act, 15 U.S.C. §717f(b), (NGA).

Petitioners propose, however, that the recently enacted Natural Gas Policy Act of 1978, 92 Stat. 3350, (NGPA), modifies that requirement by establishing definitions which would exclude petitioners' gas from being subject to the required abandonment proceedings under Section 7(b) of the NGA. In attempting to apply the exclusionary language of Section 2(18) (B) (iii) of the NGPA, it is urged that the gas being sold by petitioners is not subject to the definition of gas "committed or dedicated to interstate commerce."

Petitioners draw from the exclusionary language of the NGPA what they call a three-part test, and in their third part the petitioners wholly fail. Under the NGPA, gas is not "committed or dedicated to interstate commerce"

> "if on May 31, 1978 - - - such natural gas was not being sold in interstate commerce - - -."

The only reason the gas was not being sold in interstate commerce was because the petitioners were, in the absence of abandonment authorization, unlawfully selling the gas within the State, notwithstanding that it was dedicated to interstate commerce by the

previous production, sale and transmission of the gas in interstate commerce under Shell Oil Company's lease and sale to Michigan Wisconsin Pipe Line Company. It is their sale intrastate to Delhi, taking the gas produced from these lands out of the interstate distribution to which it had earlier been committed and dedicated, upon which petitioners rely to meet the third part of their three-part test in attempting to exclude the gas from the definition of "committed or dedicated". Such gas was denied by them interstate application and distribution notwithstanding the prior commitment and dedication, without authorization for abandonment by the Federal Energy Regulatory Commission as required by Section 7(b) of the NGA.

That is to say, without abandonment proceedings having been presented to the regulatory authority, petitioners thereby commenced to sell the gas intrastate. It was this unlawful sale of gas intrastate that was taking place on May 31, 1978, and which petitioners ask to be considered as a qualification by them under the third part of their three-part test. Inasmuch as the gas was not being sold in interstate commerce on May 31, 1978 (even though it should have been), petitioners contend that the gas is not subject to dedication or commitment to interstate commerce. This ignores entirely that the gas had been previously dedicated and committed to interstate commerce, and under the petitioners' authorities remained so until abandonment should be authorized by the regulatory authority. It is truly a boot-strapping operation that petitioners present, using their intrastate sale to demonstrate there was no interstate sale taking place on May 31, 1978, notwithstanding that their intrastate sale was prohibited by the provisions of Section 7(b) of the NGA.

The NGPA exclusion found in Section 2(18) (B) (iii) cannot be applied to petitioners gas, for such gas was subject to sale only in

interstate commerce on May 31, 1978 in the absence of abandonment proceedings under the provisions of Section 7(b) of the NGA.

On it being recognized that the NGPA does not apply to the facts of this case, we believe that it will be seen this court's decision in *United Gas Pipeline Co. v. McCombs*, 47 U.S.L.W. 4728 (June 18, 1979), has decided the issues herein and the Court of Appeals correctly applied that decision to the facts of this case.

Lastly, petitioners' concern over their posture to pursue the procedural requirements of abandonment under Section 7(b) is undeserved. By virtue of the earlier production and sale of the gas into interstate commerce the dedication and commitment were established. Such dedication and commitment continued as a fixed status of the gas notwithstanding the termination of the earlier production, until the abandonment procedure is complied with. Section 7(b) would not deny to petitioners freedom or standing to seek abandonment if public convenience or necessity warranted abandonment.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

Petitioners contend that the court of appeals improperly deferred to the Federal Energy Regulatory Commission on the question whether petitioners' natural gas is dedicated to interstate commerce.

1. Almost 20 years ago, the Federal Power Commission issued certificates of public convenience and necessity under Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c),[1] to Shell Oil Company, authorizing sale of

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[1]Section 7(c) provides in pertinent part:

> No natural-gas company * * * shall engage in the * * * sale of natural gas [in interstate commerce] unless there is in force * * * a certificate of public convenience and necessity issued by the Commission * * *.

natural gas in interstate commerce from certain wells. Production from those wells ceased in 1969 and Shell's interest terminated. No party applied to the Commission for an abandonment of the service rendered under the certificate. Years later, Texas Oil and Gas Corporation ("TXO") acquired a lease-hold interest in the acreage covered by the Shell certificate, began production anew and sold the gas in intrastate commerce. TXO sued in the District Court to quiet its title to the gas. The District Court granted relief, and in July 1979, the Court of Appeals reversed, deferring instead to the Commission's primary jurisdiction.

2. Petitioners contend that the court below erroneously failed to take account of the passage, in November 1978, of the Natural Gas Policy Act of 1978 ("NGPA"), Pub. L. No. 95-621, 92 Stat. 3350. The NGPA withdraws from the Commission's jurisdiction under the Natural Gas Act certain gas which otherwise could be required to be sold in interstate commerce. Petitioners admit they did not raise the issue in the court below, even on rehearing. Pet. 6 n.3. In these circumstances, this Court should not now consider this argument, which is raised for the first time in the petition for certiorari. *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380 (1935); see *United Stars v. Ortiz*, 422 U.S. 891, 898 (1975); cf. *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976). Petitioners' argument (Pet. 7-14) that Section 2(18)(B)(iii) of the NGPA, 92 Stat. 3354, releases their gas from a previous dedication to interstate commerce can be raised in proceedings before the Commission, which is charged with the administration of the NGPA, Section 501(a), 92 Stat. 3396.

3. Petitioners also contend that Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b),[2] did not require them to seek abandonment of the Shell certificate and they attempt to distinguish this Court's holdings in *California* v. *Southland Royalty Co.*, 435 U.S. 940 (1978) and *United Gas Pipe Line Co.* v. *McCombs*, No. 78-17 (June 18, 1979). Petitioners fail to recognize that under those precedents, a certificate obligation to provide gas to interstate commerce survives lapse of the interest of the original certificate holder, *Southland*, *supra*, and includes all production in the areas covered by the certificate. *McCombs*, *supra*. These decisions clearly establish that only the Commisison may authorize an abandonment of certificated service.

> Congress could not have been more explicit in establishing Commission approval as a prerequisite for lawful abandonment of service within its jurisdiction * * *. The language of §7(b) [15 U.S.C. §717f(b)] simply does not admit of any exception to the statutory procedure. This plain meaning has been acknowledged in several of our previous decisions.

United Gas Pipe Line Co. v. *McCombs*, *supra*, slip op. 6-7. Thus, the court below correctly ruled that petitioners were required to seek release of the pre-existing certificate obligation from the Commission.[3]

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[2]Section 7(b) provides:

> No natural-gas company shall abandon * * * any [certificated] service * * * without the permission and approval of the Commission.

[3]If petitioners believe that Shell Oil Company is a necessary party to proceedings before the Commission (see Pet. 17-18), they may move the Commission to make Shell a party to such proceedings.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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